STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
Saad, P.J., and Donofrio and Gleicher, JJ.

INTERNATIONAL UNION, UAW and its LOCAL 6000; CORRECTIONS ORGANIZATION SEIU LOCAL 526; MICHIGAN PUBLIC EMPLOYEES SEIU LOCAL 517M; and MICHIGAN STATE EMPLOYEES ASSOCIATION AFSCME LOCAL 5,

Plaintiffs-Appellants,

v.

NATALIE YAW, EDWARD CALLAGHAN, and ROBERT LABRANT, in their official capacities as members of the Michigan Employment Relations Commission; RICHARD SNYDER, in his official capacity as Governor of the State of Michigan; WILLIAM SCHUETTE, in his official capacity as Attorney General of the State of Michigan; and STATE OF MICHIGAN,

Defendants-Appellees.

Supreme Court No. 147700
Court of Appeals No. 314781

This appeal involves a ruling that a provision of the Constitution, a statute rule or regulation, or other State governmental action is invalid.

AMICUS CURIAE BRIEF OF THOMAS HAXBY

John N. Raudabaugh (P-67899)
Counsel for Proposed Amicus Curiae
c/o National Right to Work Legal Defense Foundation, Inc.
8001 Braddock Rd., Suite 600
Springfield, VA 22160
(703)321-8510
jnr@nrtw.org

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STATEMENT OF JURISDICTION

The standard of review stated in the Plaintiffs-Appellants brief is complete and correct.

STATEMENT OF QUESTIONS PRESENTED

1. Are classified civil servants protected by the free speech and free association guarantees of the Right to Work Law, 2012 PA 349?

   The Court of Appeals answered this question: "Yes."

   Amicus curiae answers: "Yes."

2. Does the Michigan Civil Service Commission have the constitutional authority to make payment of compulsory union fees a qualification for position in the civil service under Article 11, § 5 of the Michigan Constitution?

   The Court of Appeals answered this question: "No."

   Amicus curiae answers: "No."

STATEMENT OF FACTS

Amicus curiae adopts by reference the statement of facts of the Defendants-Appellees.

INTEREST OF AMICUS CURIAE

Thomas Haxby is employed by the Michigan Department of Natural Resources in a classified civil service position. In the past, Haxby was required to join or pay compulsory fees to Plaintiff-Appellant SEIU Local 517M as a condition of his employment. With the passage of Michigan's Right to Work Law, 2012 PA 349, Haxby is now free to decide for himself whether he wants to pay fees to this union. In this action, the SEIU Local 517M and other unions seek to strip Haxby and all other civil servants of their new legal rights, and again require that they pay compulsory fees upon pain of termination of their employment. Haxby thereby submits this amicus brief to protect his right to work.

SUMMARY OF ARGUMENT

This brief expands on two dispositive points made by the State Defendant-Appellees. *First*, the Legislature can protect the constitutional rights of civil servants to choose whether to associate with labor organizations because this Court recognized that the Legislature could, through the Political Freedom Act, MICH. COMP. LAWS §§ 15.401 *et seq.*, protect the constitutional rights of civil servants to choose whether to associate with political organizations. *See Michigan State AFL-CIO v. Mich. Civil Service Comm'n*, 455 Mich. 720, 566 N.W.2d 258 (1997); *Council No. 11, AFSCME v. Civil Serv. Comm'n*, 408 Mich. 392; 292 N.W.2d 442 (1980). Compelled association with either type of organization implicates the same rights to free speech and association guaranteed by the United States and Michigan constitutions. *See e.g.*, *Knox v. Serv. Employees Int'l Union, Local 1000*, 132 S. Ct. 2277, 2289-90 (2012).

The Right to Work law is remarkably similar to the Political Freedom Act. The Political Freedom Act provides public employees with a right to be members of political parties, and a corresponding right not to be forced by their employer to pay anything of value to political organizations against their will. *See* MICH. COMP. LAWS §§ 15.402(a), 405. The Right to Work law similarly provides public employees with a right to be members of unions, and a corresponding right not to be forced by their employer to pay anything of value to a union against their will. *Id.* at § 423.210(3). Given their parallel nature, that the Political Freedom Act constitutionally applies to civil servants means the Right to Work law must also apply to them.

Second, the Right to Work law cannot conflict with the Civil Service Commission's jurisdiction because the Commission lacks authority to force civil servants to pay compulsory union fees in the first place. Michigan's Constitution requires that the Commission "determine by competitive examination and performance *exclusively on the basis of merit, efficiency and*

fitness the qualifications of all candidates for positions in the classified service." Mich. Const. art 11, § 5 (emphasis added). The Commission cannot make a willingness to pay compulsory union fees a "qualification[ ] of all candidates for positions in the classified service" because such a qualification is wholly unrelated to "merit, efficiency and fitness." *Id.*

Indeed, the principal purpose for Article 11, § 5 is to ensure that civil servants cannot be required to pay tribute to political entities to maintain their employment. *See Council No. 11*, 408 Mich. at 397-401. For the Commission to rely on this constitutional provision to justify its practice of forcing civil servants to pay tribute to politicized unions to keep their jobs turns the purpose of Article 11, § 5 on its head. The Court should hold that the Commission lacks the authority to condition employment in the civil service on payment of monies to a union.

ARGUMENT

I. THE RIGHT TO EARN A LIVING WITHOUT BEING FORCED TO JOIN OR FINANCIALLY SUPPORT A PRIVATE ORGANIZATION IS A CIVIL AND CONSTITUTIONAL RIGHT THAT THE MICHIGAN LEGISLATURE HAS AUTHORITY TO PROTECT

1. Michigan's Legislature Has Authority to Enact Laws That Protect the Constitutional Rights of Citizens Employed in the Classified Civil Service

This Court has recognized the Legislature's authority to enact laws that protect the speech and associational rights of individuals employed in the classified civil service. In 1976, Michigan enacted a Political Freedom Act, MICH. COMP. LAWS §§ 15.401–15.407. The Act protects the rights of public employees to be members of political parties, *id.* at § 15.402(a), to engage in political activities on their own time, *id.* at § 15.402(c), and to not be forced to pay anything of value to a political party or political organization against their will, *id.* § 15.405.

In *Council No. 11*, this Court held that the Political Freedom Act applies to classified civil servants and invalidated a conflicting Commission rule that banned state employees from

engaging in political activities. 408 Mich. 392. In so doing, this Court rejected the Commission's argument that it had exclusive jurisdiction over the matter, because the Political Freedom Act protected employees' rights of free speech and association under Michigan's Constitution, which is a proper matter of legislative concern:

> The power, indeed the duty, to protect and insure the personal freedoms of all citizens, including the rights of free speech and political association, is reposed in the Legislature as one of the three co-equal branches of government by Art. 1 of the Michigan Constitution. The enactment of laws designed to assure the protection and enhancement of such rights is therefore a particularly proper legislative concern.

408 Mich. at 394–95.

Subsequently, this Court held in *Michigan State AFL-CIO* that the Political Freedom Act also invalidated Commission rules that prohibited civil servants from using employer-provided leave of absence for political and union activities. 455 Mich. 720. This Court again relied on the fact that the act protects constitutional interests in free speech and association to narrowly construe the Commission's exclusive authority. 455 Mich. at 732–33.

In addition to laws that protect freedom of speech and association, state laws that protect other constitutional rights have also been held applicable to civil servants, such as laws that address racial and other forms of discrimination. *See Walters v. Dep't of Treasury*, 148 Mich. App. 809; 385 N.W.2d 695 (1986); *Marsh v. Dep't of Civil Serv.*, 142 Mich. App. 557, 370 N.W.2d 613 (1985). The lower courts recognized that the Commission's authority to enact discrimination rules does not invalidate or override anti-discrimination laws because the constitutional provisions empowering the Commission must be read in conjunction with other constitutional provisions that prohibit discrimination. *See Walters*, 148 Mich. Ct. App. at 816-18; *Marsh*, 142 Mich. Ct. App. at 567-69.

Just as the Legislature can lawfully protect civil servants with regard to political rights and discrimination, the Legislature may permissibly protect the right of civil servants not to join or financially support a union. This is so, because compelled association with a union impinges on fundamental constitutional and human rights that the Legislature may protect.

2. Michigan's Right to Work Law Protects Civil Servants' Rights to Free Association Enshrined in the United States Constitution, Michigan Constitution, and Under International Law

a) The Right to Work Law Effectuates Associational and Speech Rights Guaranteed by the United States and Michigan Constitutions

The right to freely choose those with whom we associate is embedded in our nation's constitutional DNA. *NAACP v Ala. ex rel. Patterson*, 357 U.S. 449 (1958). The First Amendment to the United States Constitution guarantees a "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v United States Jaycees*, 468 US 609, 622 (1984). Given that "'freedom of association . . . plainly presupposes a freedom not to associate,'" *Knox*, 132 S. Ct. at 2289 (quoting *Roberts,* 468 U.S. at 623), a state infringes on First Amendment rights when it forces individuals to associate with others against their will. *See, e.g., Boy Scouts of Am. v Dale*, 530 U.S. 640 (2000); *Hurley v Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557 (1995) .

Similarly, "freedom of speech prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Academic & Inst. Rights*, 547 US 47, 61 (2006). As a result, a state infringes on an individual's First Amendment rights when it compels them to support or associate with speech against their will. *See Wooley v Maynard*, 430 U.S. 705, 714 (1977) (holding unconstitutional a mandate that citizens use license plates with the state's "Live Free or

Die" motto because the First Amendment "includes both the right to speak freely and the right to refrain from speaking at all").

Michigan's Constitution also guarantees individuals a right to free association and to freedom of speech. Mich. Const. art 1, § 3 ("The people have the right peaceably to assemble, to consult for the common good, to instruct their representatives and to petition the government for redress of grievances"); *id.* at art 1, § 5 (protecting freedom of speech). This right also includes a right to be free from compelled expressive association. *See Falk v State Bar of Mich.*, 418 Mich. 270, 287, 342 N.W.2d 504 (1983); *People v. Jensen*, 231 Mich. App. 439, 461–63; 586 N.W.2d 748 (1998). Indeed, Michigan's Declaration of Rights "has been interpreted as affording broader protection of some individual rights also guaranteed by the federal constitution's Bill of Rights." *Woodland v. Mich. Citizens Lobby*, 423 Mich. 188, 202, 378 N.W.2d 337, 343 (1985).

The United States Supreme Court has long held that forcing public employees to financially support a union "constitute[s] a form of compelled speech and association that imposes a 'significant impingement on First Amendment rights.'" *Knox*, 132 S. Ct. at 2289 (*quoting Ellis v. Railway Clerks*, 466 U.S. 435, 455 (1984)). This impingement is so significant that it is subject to "exacting First Amendment scrutiny," and must be justified by "'compelling state interests . . . that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Id.* at 2289 (quoting *Roberts*, 468 U.S. at 623). While this impingement was found to be partially justified in the past, *see Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), the Supreme Court recently questioned whether compulsory union fees "cross . . . the limit of what the First Amendment can tolerate," *Knox*, 132 S. Ct. at 2291, and may rule on this matter in June 2014 in *Harris v. Quinn*, No. 11-681 (U.S. argued Jan. 21, 2014).

By making it unlawful for Michigan public employers to force their employees to join or pay compulsory fees to a union, *see* MICH. COMP. LAWS § 423.210(3), the Right to Work law protects these citizens from a "'significant impingement on [their] First Amendment rights.'" *Knox*, 132 S. Ct. at 2289 (*quoting Ellis*, 466 U.S. at 455); *see Nat'l Right to Work Legal Def. & Educ. Found. v United States*, 487 F. Supp. 801, 806 (E.D.N.C. 1979) (recognizing that Right to Work laws protect "individual liberty involving a human dignity specifically guaranteed by the Constitution"); *cf. Truax v Raich*, 239 U.S. 33, 41 (1915) (noting "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the (Fourteenth) Amendment to secure."). Michigan's Right to Work law thereby implements and furthers rights to free speech and association guaranteed by the United States and Michigan Constitutions.

b) Michigan's Right to Work Law Effectuates Human Rights Recognized under International Law

Over two-hundred years ago, Thomas Jefferson recognized that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical." THOMAS JEFFERSON, A BILL FOR ESTABLISHING RELIGIOUS FREEDOM (1779), reprinted in 5 THE FOUNDERS' CONSTITUTION 77 (University of Chicago Press 1987) (quoted in *Abood*, 431 U.S. at 235 n.31). This fundamental principle of free association is now enshrined in international law.

The United Nations' Universal Declaration of Human Rights states unequivocally: "Everyone has the right to freedom of peaceful assembly and association[,]" and "[n]o one may be compelled to belong to an association." Universal Declaration of Human Rights art. 20, (Dec

10, 1948).[1] Similarly, Article 11 of the European Convention on Human Rights recognizes the right to free association and non-association:

> 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.[2]

The European Court of Human Rights has held that Article 11 protects employees' rights to not associate with unions. *See Young, James & Webster v. United Kingdom*, 44 Eur. Ct. H.R. (ser. A) (1981) (discharge of three British Rail employees for their refusal to join a trade union under a closed shop agreement held unlawful); *Sigurdur A Sigurjónsson v Iceland*, App. No. 16130/90, 16 Eur. Ct. H.R. 462 (ser. A) (1993) (requiring membership in a professional organization to obtain employment as a taxi driver unlawful); *Sorensen & Rasmussen v Denmark*, App. Nos. 52562/99 & 52620/99, 46 Eur. Ct. Hr. 572 (2006) (Grand Chamber of court holding all closed shop provisions illegal under Convention Article 11). The *Sigurjónsson* Court recognized that "[a] growing measure of common ground has emerged in this area . . . at the international level," 16 Eur. Ct. H.R. 462, at ¶ 35, noting, for example, that "according to the practice of the Freedom of Association Committee of the Governing Body of the International Labour Office (ILO), union security measures imposed by law, notably by making union membership compulsory, would be incompatible with [International Labor Organization] Conventions Nos. 87 and 98 (the first concerning freedom of association and the right to

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[1] *See at* http://www.un.org/en/documents/udhr/index.shtml (last visited Mar. 19, 2014).

[2] *See* http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm (last visited Mar. 19, 2014).

organize and the second the application of the principles of the right to organise and to bargain collectively)." *Id.*

Michigan's Right to Work law thereby not only protects and effectuates the rights to free association recognized under the United States and Michigan constitutions, but also human rights to free association recognized under international law. The decision of the Michigan Legislature to enact such a freedom enhancing law should be sustained.

3. The Court of Appeals Correctly Held the Right to Work Law Protects the Rights of Classified Civil Servants

Given that the Legislature has authority to protect civil servants' constitutional rights to free speech and association, and that the Right to Work law protects these types of rights, the Court of Appeals correctly held PA 349 applicable to civil servants. *Int'l Union, UAW v. Green*, 302 Mich. App. 246, 839 N.W.2d 1 (2013) (Pet. App. 6a). The lower court correctly accepted the premise that "the constitution expressly mandates the Legislature to implement constitutional provisions prohibiting discrimination and securing civil rights of all persons," *Id.* at 273 (quoting *Dep't of Transp. v Brown*, 153 Mich. App. 773, 781, 396 N.W.2d 529 (1986)) (Pet. App. 19a), and the premise that compulsory union fees "unquestionably implicate constitutional rights." *Id.*. at 278, 839 N.W.2d at 18 (Pet. App. 22a). The conclusion that the Legislature can protect the associational rights of civil servants from compulsory union membership and fee requirements flows inextricably from these premises.

The Right to Work law's application to civil servants is just as appropriate as the application of Michigan's Political Freedom Act to civil servants, which this Court upheld in *Council No. 11* and *Michigan State AFL-CIO*. The laws' provisions are quite similar, in that both prohibit restrictions on membership and compulsory payments.

The Political Freedom Act prevents public employers, which includes the Commission, from punishing civil servants if they "[b]ecome a member of a political party . . . [or] engage in other political activities on behalf of a candidate or issue in connection with partisan or nonpartisan elections." MICH. COMP. LAWS §§ 15.402(a) & (c). The act also makes it unlawful "to coerce, or command another public employee to pay, lend, or contribute anything of value to a party, committee, organization, agency, or person for the benefit of a person seeking or holding elected office, or for the purpose of furthering or defeating a proposed law, ballot question, or other measure that may be submitted to a vote of the electors." *Id.* § 15.405.

The Right to Work law does almost exactly the same thing as the Political Freedom Act, but it is directed towards membership and compulsory payments to unions. The Right to Work law makes it unlawful for public employers, including the Commission, to require that employees "refrain or resign from membership in . . . a labor organization or bargaining representative" or "become or remain a member of a labor organization or bargaining representative." *Id.* § 423.210(3)(b). It also makes it unlawful to force public employees to "[p]ay any dues, fees, assessments, or other charges or expenses of any kind or amount, or provide anything of value to a labor organization or bargaining representative." *Id.* § 423.210(3)(c).

That the Political Freedom Act governs membership and involuntary payments to political organizations, and the Right to Work law governs membership and involuntary payments to labor organizations, is a distinction without a difference. State actions affecting either activity implicate the same core First Amendment rights. *See, e.g., Knox*, 132 S. Ct at 2288–89. Indeed, "the public-sector union is indistinguishable from the traditional political party in this country," because "[t]he ultimate objective of a union in the public sector, like that of a

political party, is to influence public decision making in accordance with the views and perceived interests of its membership." *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 256 (1977) (J. Powell, concurring in judgment); *see id.* at 231 (noting "[t]here can be no quarrel with the truism that because public employee unions attempt to influence governmental policymaking, their activities and the views of members who disagree with them may be properly termed political") (majority opinion); *cf. Knox*, 132 S. Ct. at 2289 (recognizing that a "public-sector union takes many positions during collective bargaining that have powerful political and civic consequences").

Accordingly, given this Court's holdings in *Council No. 11* and *Michigan State AFL-CIO* that the Legislature has the authority to protect the constitutional rights of civil servants to support or not support political entities, it follows that the Legislature also has authority to protect the constitutional rights of civil servants to support or not support unions. Just like the Political Freedom Act, the Right to Work law is applicable to civil servants.

II. MICHIGAN'S CIVIL SERVICE COMMISSION LACKS THE AUTHORITY TO COMPEL CIVIL SERVANTS TO FINANCIALLY SUPPORT A UNION AS A CONDITION OF THEIR EMPLOYMENT

The Commission's jurisdiction does not deprive civil servants of the protections afforded by the Right to Work law for another reason—the Commission never had the lawful authority to condition employment in the civil service on paying money to a union in the first place. Michigan's Constitution grants the Commission the following relevant authority:

> The commission shall classify all positions in the classified service according to their respective duties and responsibilities, fix rates of compensation for all classes of positions, approve or disapprove disbursements for all personal services, determine by competitive examination and performance *exclusively on the basis of merit, efficiency and fitness the qualifications of all candidates for positions in the classified service*, make rules and regulations covering all personnel transactions, and regulate all conditions of employment in the classified service.

Mich. Const. art. 11, § 5 (emphasis added). As this language makes plain, employment in the civil service must be "exclusively on the basis of merit, efficiency and fitness." *Id.*

The Commission's policy of forcing civil servants to financially support a union to keep their jobs, *see* Commission Rule 6-7 *et seq.*, is incompatible with Article 11, § 5 of the Michigan Constitution. This compulsory fee requirement is not a job "qualification[ ]" made "exclusively on the basis of merit, efficiency or fitness." Mich. Const. art. 11, § 5. In fact, it has nothing to do with "merit, efficiency or fitness." *Id.* The Commission is conditioning employment on an employees' willingness to pay compulsory fees to an outside third party.

The Commission's compulsory fee requirement is inconsistent not only with the text of Article 11, § 5, but also its very purpose—ending the practice of political patronage. *See Council No. 11*, 408 Mich. at 397-401 (detailing origin of Michigan's Constitution Article 11, § 5). "[T]he focus [of the constitutional amendment] . . . was upon the basic evils in state civil service under the spoils system and the ineffectual 1939 acts: appointments, promotions, demotions and discharge based upon partisan political considerations." *Id.* at 401; *see Green*, 302 Mich. App. at 277 (Pet. App. 22a) (noting "the very reason the people adopted Const. 1963, art. 11, § 5 was to provide for a merit-based system of governmental hiring and employment, eliminate politics, and provide for an apolitical body to regulate issues regarding employee qualifications, promotion, and pay."). The Commission itself admits that it was created to "rid state government of political patronage and the 'spoils system.'" Commission Brief in Support of Leave to Appeal, at 2.

Political patronage and the spoils system are, of course, policies of conditioning public employment on membership in, or making contributions to, a political party. *See e.g., Elrod v. Burns*, 427 U.S. 347, 353–56 (1976). Commission Rule 6–7 is simply a variation of the

patronage system that Article 11, § 5 was meant to eliminate. Instead of compelling civil servants to directly support a political party to keep their jobs, the Commission is indirectly doing so by forcing civil servants to support interest groups that are closely affiliated with a particular political party and functionally "indistinguishable from the traditional political party in this country." *Abood,* 431 U.S. at 256 (J. Powell, concurring in judgment). The Commission is turning Article 11, § 5 on its head by conditioning employment in the civil service on an employees' willingness to become a member or make contributions to politicized unions.

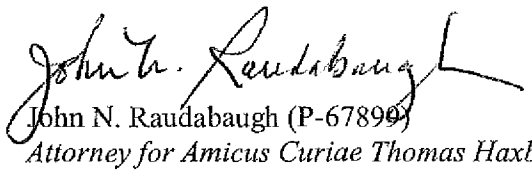
Plaintiff-Appellants reliance on *Dudkin v. Mich. Civil Serv. Comm'n,* 127 Mich. Ct. App. 397, 339 N.W.2d 190 (1983), for the proposition that the Commission can impose an agency shop is misplaced. *See* Opening Br. 14. As the Court of Appeals below recognized, *Dudkin* is both inapposite and has been superseded by statute. *Green,* 302 Mich. App. at 280–81 (Pet. App. 23a-24a); *see* State-Appellee Br., 11-12. In any event, *Dudkin* is not binding on this Court. To the extent it is apposite, it should be overruled for the reasons stated above.

In short, the Commission lacks the constitutional authority to condition employment in the civil service on making payments to an outside interest group, whether it be a political party or union. Article 11, § 5 requires that qualifications for employment in the civil service be "exclusively on the basis of merit, efficiency and fitness" precisely to prohibit conditioning employment on such outside affiliations. Accordingly, given that the Commission lacks authority to require payment of compulsory fees, the Right to Work law's prohibition on this practice cannot interfere with the Commission's jurisdiction.

CONCLUSION AND RELIEF SOUGHT

Right to Work laws protect basic human and constitutional rights to freedom of speech and association. Accordingly, this Court should uphold the Michigan's Legislature's ability to enact laws that effectuate important constitutional rights like the freedom of association, thereby outlawing union practices that coerce association in violation of Michigan workers' fundamental rights. This Court should affirm the Court of Appeals' judgment that the Right to Work law is valid as within the province of Michigan's Legislature to enact.

Respectfully submitted,



John N. Raudabaugh (P-67899)
Attorney for Amicus Curiae Thomas Haxby
c/o National Right to Work Legal Defense Foundation, Inc.
8001 Braddock Rd., Suite 600
Springfield, VA 22160
(703)321-8510
jnr@nrtw.org

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